Filed 7/27/09 R.W. v. Superior Court CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

R.W.,

Petitioner,

v.

THE SUPERIOR COURT OF MERCED COUNTY,

Respondent;

MERCED COUNTY HUMAN SERVICES AGENCY,

Real Party in Interest.

F057796

(Super. Ct. No. 27734)

O P I N I O N

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Harry L. Jacobs, Commissioner.

Jeffrey A. Tenebaum, for Petitioner.

No appearance for Respondent.

James N. Fincher, County Counsel, and James B. Tarhalla, Deputy County Counsel, for Real Party in Interest.

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*Before Vartabedian, Acting P.J., Gomes, J., and Kane, J.

Petitioner (mother) seeks an extraordinary writ (Cal. Rules of Court, rule 8.452 (rule 8.452)) from respondent court's order issued at a contested 12-month review hearing terminating her reunification services and setting a Welfare and Institutions Code section 366.26[1] hearing as to her son E. We conclude her petition fails to comport with the procedural requirements of rule 8.452. Accordingly, we will dismiss the petition as facially inadequate.

STATEMENT OF THE CASE AND FACTS

Dependency proceedings were initiated by the Merced County Human Services Agency (agency) in October 2007 when petitioner and newborn E. tested positive for methamphetamine. Petitioner told the social worker she used methamphetamine throughout her pregnancy. She also said she was diagnosed with Obsessive Compulsive Disorder and Attention Deficit Disorder and was not taking medication or receiving counseling for it. She identified E.'s father as David, then serving a prison sentence for domestic violence perpetrated against petitioner. According to petitioner, David kicked her in the head when she was four months pregnant, causing her to lose consciousness. She planned to resume her relationship with him upon his release from custody.

The juvenile court adjudged E. a dependent of the court and set the matter for disposition in January 2008. Meanwhile, petitioner completed a psychological evaluation as a result of which the examining psychologist diagnosed her with bipolar disorder. The psychologist recommended petitioner consult with a psychiatrist for medication monitoring, participate in residential drug treatment and, when more stable, enroll in domestic violence counseling for victims.

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

In January 2008, at the dispositional hearing, the juvenile court removed E. from petitioner's custody and ordered her to participate in domestic violence and mental health counseling, complete a psychotropic medication evaluation and residential substance abuse treatment, and submit to random drug testing.

In its 12-month review of services, the agency recommended the court terminate petitioner's reunification services for noncompliance and set a section 366.26 hearing to implement a permanent plan. She refused to participate in domestic violence counseling, stating she did not need it. She was not consistently taking her medication or attending therapy sessions. In addition, she refused to drug test in November and December of 2008 and January of 2009. She also missed visits with E. and, though previously loving and attentive, had become impatient and emotionally absent. In January 2009, petitioner was arrested for assaulting her mother with whom she had been residing.

In April 2009, the juvenile conducted the contested 12-month review hearing. Petitioner testified she had been participating in domestic violence counseling since January 2009, or slightly before, but did not believe she needed it. She only attended because it was easier to do what her caseworker told her to do. She also testified she began participating in a drug treatment program under Proposition 36 in June 2008 after she was "caught with a five-sack of drugs." As part of that program, she attended Narcotics Anonymous meetings five times a week and was working the 12-Step program. She testified she was on step one. Petitioner also testified she was drug testing for probation and tested positive for methamphetamine in November 2008 after having been drug-free for seven to eight months. She explained she wasn't progressing in her case plan and made the mistake of using methamphetamine.

At the conclusion of testimony and argument, the juvenile court found there remained a substantial danger if E. were returned to petitioner's custody. The court also found there was not a substantial probability E. could be returned to petitioner's custody

if services were continued. Consequently, the court terminated reunification services and set the section 366.26 hearing. This petition ensued.

DISCUSSION

A lower court's judgment or order is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Consequently, an "appellant must affirmatively demonstrate error by an adequate record." (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) With respect to writ petitions challenging the setting of a section 366.26 hearing, California Rules of Court, rule 8.452 (rule) specifies, inter alia, that the writ petition must include a summary of the significant facts and identify contested legal points with citation to legal authority and argument. (Rule 8.452(b).) At a minimum, the writ petition must "adequately inform the court of the issues presented, point out the factual support for them in the record, and offer argument and authorities that will assist the court in resolving the contested issues." (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 583.)

The writ petition does not contain a summary of the factual basis for the petition. Nor does it contain points and authorities setting forth legal arguments with citation to the disputed facts in the appellate record. Rather, without such citation or legal authority, petitioner claims that the "trial court erred in terminating family reunification services for [p]etitioner and/or not returning the minor to [p]etitioner's custody with family maintenance services. There was a failure to demonstrate by clear and convincing evidence that there is a continuing danger to the minor if returned to [p]etitioner. Petitioner has made efforts to alleviate the problems leading to detention of the minor." Since petitioner fails to support any alleged error with legal argument and citation both to legal authority and to the appellate record, her petition fails to comport with rule 8.452 and warrants dismissal for facial inadequacy.

Further, even if this court were to construe the petition as challenging the juvenile court's order terminating reunification services rather than return E. to petitioner's custody under family maintenance, we would conclude substantial evidence supports the juvenile court's order. A child's safety is the juvenile court's paramount concern and, in this case, the court found E. would be in danger if returned to petitioner's custody. Consequently, family maintenance was not an option. Further, at this stage of the proceedings, the juvenile court had no choice but to set the section 366.26 hearing unless it found there was a substantial probability E. could be returned to petitioner's custody following continued services. (§ 366.21, subd. (g)(1).) In this case, the juvenile court could not find, based on the record before it, that a substantial probability of return existed. We concur.

DISPOSITION

The petition for extraordinary writ is dismissed. This opinion is final forthwith as to this court.